BRIEF ANALYSIS

OF THE

MILITARY BILL,

BY A

MEMBER OF THE NEW ORLEANS BAR.

PRESIDENT JOHNSON'S DUTIES ARE DEFINED AND LIMITED BY SECTION TWO OF THE LAW. HE CANNOT PEREMPTORILY INSTRUCT THE DISTRICT COMMANDER AS TO THE DUTIES OF THE LATTER, DESIGNATED BY LAW. Page 4.

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INTRODUCTORY LETTER.

New Orleans, La., June 17, 1867.

Colonel George A. Forsyth, U. S. A.,

Secretary of Civil Affairs, Fifth Military District:

Having previously submitted to your consideration an inconvenient form of an analysis of the Military Bill, I now have the honor to address the same in a more desirable form with a few additions and corrections.

This law of Congress and its practical effects now powerfully absorbs public attention. The people of the South are not alone affected by it. The whole nation is vitally interested and deeply moved by it. History furnishes no parallel instance of a great nation convulsed by so gigantic a rebellion and finally eventuate in an adjustment in the manner foreshadowed by Congress in this law.

Being without a paralled instance, and the law itself not free from ambiguity in many respects—the analysis was dependent alone upon the points given and deductions from elementary principles. No precedents, no exampled authorities to quote.

New, delicate and extraordinary duties, powers and responsibilities are imposed on the District commanders by the general features of the law, but all this was heightened and intensified by the superadded new feature of the extension without blame, of universal suffrage to the lately disenthralled black race.

The views and legal deductions contained in the annexed analysis are the result of a close and earnest effort, first written in discharge of my official duty, to Brevt. Major General Joseph A. Mower, commanding in this State next to Major General P. H. Sheridan. These views and conclusions having been matured with an aim of befitting dignity to the proper discharge of my duty as attorney, it required but little additional labor to embrace some additional points not then called out, and to prepare extra copies at intervals, which I was pleased to see found a ready welcome in the New Orleans Republican, on different days.

It will be seen on page 8, the first article appeared May 30th, under the caption: "Registration," but it is appropriately part and parcel of the analysis, and was elicited by the first announcement of the elaborate opinion of Attorney General Stanbery, whose cramping opinion was delusively supposed by a majority of the public to be a finality, and binding with the force of an edict upon all authorities, the Picayune, Crescent, and Times, and kindred papers using extraordinary exertions to foster and keep alive that delusion.

Extraordinary measures, also, were more than hinted and radiated broadcast, that President Johnson then would soon issue, or cause to be issued, peremptory instructions, overriding the district commanders, by directing implicit conformity to the announced opinions of the Attorney General, in all matters of duty under the law, as also interpose other positive executive interference.

This prompted me to follow the subject by a bold and square *denial* that President Johnson had any such authority, under the law designated. Announced June 4, see page 4.

The point plainly stated thus:

"We thus see he, (district commander), must look to Congress and laws thereof for authority and guidance in this matter of rebel State reconstruction, and not look to the President or General Grant.

The President can appoint—perhaps remove and reappoint. But we take it he *cannot instruct*, for the law nowhere says so, and *his* duties also are defined by law. This latter position is capable of a demonstration akin to mathematical precision."

This position being entirely new and made public for the first time, of course met the prompt simulated ridicule of the opposition, and even many of our own friends had doubts and misgivings as to its complete correctness, recollecting that the constitution made the President "Commander in Chief of the Army and Navy," and not seeing at first glance that the district commander, under the Military bill, occupied a standpoint entirely distinct from ordinary army duties and army routine of implicit obedience to orders. I deemed it necessary to meet and overturn that delusion, which exposition appeared June 7, page 4.

Paragraph thirteen of the summary makes this prediction:

"It is highly improbable that the Secretary of War will counsel interference by peremptory instructions. He is himself too good a lawyer for that." Page 7.

This was penned on the 10th June, but did not appear until the 12th; and on the 13th, I had the gratification of seeing my prediction confirmed by the Washington city news, that Mr. Stanton's silence in cabinet counsel was clearly regarded a dissent to the views of the Attorney General; and that General Grant was not present, which, under the circumstances, seemed to possess a significance not to be misunderstood.

It will be further noticed, as early as June 7, I predicted President Johnson would not interfere, no matter how strong his desire; but that if he did, "Congress would be heard in tones not to be misunderstood." Page 5.

This conclusion was based upon the theory that each of the three co-ordinate branches of government has a distinct sphere assigned by the Constitution, and that the executive could not step into the legislative sphere with impunity; that Congress alone has power to

declare war, and at the termination thereof, make final adjustments in its own way.

Concerning any delicate case that may chance to spring the question of right to the writ of *habeas corpus*, under the constitution, article 1, section 9, paragraph 2, for the sake of brevity, I deem it unnecessary to now dwell, being virtually already anticipated.

I have no vanity in this matter, and of course I have not lost sight of the fact, that Major General P. H. Sheridan, for many months, has acted in advance of all I have said. But he has also far outrun the Attorney General, and justly.

Repeating my apology first named, and hoping what I have written may have the good fortune to not conflict with General Sheridan's views of propriety, I remain,

Your obedient servant,

J. P. BOYD.

[Published June 4, 1867.]

THE MILITARY BILL.—Legal Analysis Thereof.

Occupying the high standpoint you do in the greatest city in the South, it is natural the whole loyal South should turn to you and your paper for a solution of the many new, intricate, and doubtful questions, now vitally affecting the whole people. Already your paper has silenced the three rebel guns in this city on the subject of the duty of registrars, as affected by the Attorney General's opinion.

The political attitude of the rebel States has no parallel in history. "The military bill" is an anomaly, but is unquestionably justifiable, and in truth is the mildest, the most lenient, and the most benignant remedy ever a great nation administered on a rebellious people, whose smothered hostility is too palpable to be blinked. Yet mild as this military bill is, and lenient as the same is, to the verge of permitting "liberty to pluck justice by the nose," still it has been execrated

and denounced by the opposition press of this city as the unconstitutional bastard offspring of a "rump Congress."

A clear analysis of that law shows that it is too lenient, and in reality was a compromise of many widely variant plans. The preamble first asserts a fact notorious to all people, that "No legal State governments, or adequate protection for life or property, now exist in the rebel States." Such being the case, it became and was the duty of Congress to speedily apply an ample remedy.

Let us see if they have done so.

First section declares "that said rebel States shall be divided into military districts and made subject to the military authority of the United States." To stop there, would give unlimited military power over all matters. But the law does not stop there. On the contrary, it defines the district commander's duties very considerably.

Sec. 3. "It shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property."

Secondly, "To suppress insurrections, disorders and violence."

Thirdly. "To punish or cause to be punished all disturbers of the public peace and criminals." This sweeps in many things. But wait a little.

Let us see how the officer is to perform all this work so rigorously pointed out. Does he have the full sweep of the whole circle of his discretion? Very far from it. He has a prescribed orbit fixed and but dimly seen. Section three declares that he may allow local civil tribunals to have jurisdiction and try offenses. Not a word about ordinary actions or suits at law. Again the law says, "when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose." For what purpose are military commissions to be organized? Answer—to try offenders; not to attend to civil suits at law. When to be organized? At the discretion of the officer. The whole gist of authority limited to offenses and offenders. This, of course, includes offenses to rights of property as well as to rights of person; against rights of property, as in theft, arson, robbery, trespass, etc. Not collection of debts.

Section 3, last clause, declares "there shall be no interference under color of State authority;" which implies that for civil purposes the *de facto* State governments may continue many of their functions under straint, so that the wheels of the entire civil machinery need not be brought to a stand-still.

Whether all three of the co ordinate branches of the government, legislative, executive, and judicial, can continue their functions *de facto*, springs new and delicate questions, especially as to the legislative branch.

One thing is clear, these States lingering in a *quasi* war attitude are now subject to the military authority of the United States, which authority in turn is subject, in this behalf, to the paramount authority of Congress. This latter cuts off much paramount military authority supposed to exist in the hands of the district military commander, and *we thus see he must look to Congress* and laws thereof for authority and guidance in this matter of rebel State restoration, and not look to the President or General Grant. The President can appoint perhaps remove and reappoint. But we take it he *cannot instruct*, for the law nowhere says so, and *his* duties also are defined by law. This latter position is capable of a demonstration akin to mathematical precision, and yet doubtless it will astound the entire opposition. We admit the President and General Grant may counsel, advise, and suggest.

For a future analysis we reserve the delicate legal questions: How far district commanders are limited by law; what is the orbit of their discretion; when they

may legally remove civil officers; whether and when they can remove State governors; when remove judicial or ministerial officers; when suspend or annul a judicial decision or civil writ; and what, if any of those things they can do, unless to prevent "interference under color of State authority," in which case no diversity of opinion can exist.

LIMITED POWER OF THE PRESIDENT.

[Published June 7, 1867.]

We now only have time to partially continue the analysis promised in your daily of the 4th inst.

Touching many delicate points last named we must defer, for the present, in order to pay our respects to objections made to our startling announcement that "the president can appoint, perhaps remove and re-appoint: but we take it he *cannot instruct*, for the law no where says so, and *his* duties also are defined by law;" and stated the "position is capable of a demonstration akin to mathematica precision."

True enough, it startled and astounded in more ways than one, and it is more than hinted that high officials at Washington city are preparing to act upon the theory that the President can and will instruct the district officers; that he can and will instruct, direct, and enforce instructions touching district officers' duties in matters of detail under the military bill.

But we are well satisfied these hints are not well founded. Better inspirations surely will prevail; for if not, Congress will surely make itself heard in tones not to be misunderstood.

We must not lose sight of the fact that Congress alone has power under the Constitution to declare war, and make final terms of adjustments; and further, we will not soon forget the memorable fact that the named rebel States were lately waging a formidable war against the government, and that although armed hostility has ceased, a *quasi* war state still exists, and that under the Constitution no authority but Congress can legitimately adjust terms of permanent settlement and that in the exercise of that right they have regarded and declared that "*no legal State governments now exist*" in those rebel States, and justly deem it their duty to give their earnest attention to a final adjustment thereof; in the meantime continuing said States under the military authority of the United States, and dividing said rebel States into five military districts for greater convenience and efficiency.

In the general plan and purpose contemplated by this military bill, we find it akin to the formation of territorial governments for unorganized territories, combined with an enabling act preparatory to a recognition of a full State government, matters of more or less frequent occurrence ever since the foundation of the government.

For the purpose of putting the machinery of the military bill in motion, suppose Congress had required the President to appoint a competent civilian superintendent, which could have been done, instead of a military officer for each of the five districts, and just as has been done in section two, directed the President to "detail sufficient military force" to enable such civilian superintendent to perform his duties pointed out by law, it is plain such superintendent, like the territorial governor, after appointment and due entrance upon duty, could not be instructed as to plain duties prescribed by law. While he kept within the letter and spirit of the law in that behalf, he could not be instructed officially by the Attorney General, nor could he be dictated to by the President, Secretary of War, or otherwise.

Should he need military force to enable him to perform his duty under the law.

then it would become the duty of the President, if called on, to detail a sufficient military force, under proper military officers, to support and aid the superintendent in the performance of his duties, such as registration, "protection of the rights of person and property, suppress insurrection, disorder, and violence, etc."

Now, is it not clear the position, rights, duties, and responsibilities of a civilian superintendent, if such the law had required, is the precise standpoint in which we must view the district military officer disconnected from the ordinary army duties and routine?

The great difficulty is to cut loose the idea of army officer from the idea of ordinary army duties and responsibilities as to obeying orders.

But we must take a second thought and see that the military officer assigned to duty under the military bill has an orbit therein distinct from ordinary army duties and responsibilities, and that his new orbit is created by law to which he must conform.

Many of his duties are enumerated by law and much left to his discretion; and considering he is independent of *instructions*, his responsibilities are truly great. He can only be checked and mated by the removing power of the President. Congress alone can control, curtail or modify his actions, or of course terminate the whole machinery.

General Pope's action in the removal of the city officers of Mobile is severely criticized, on the alleged ground that none of those officers had offered any impediment to registration or operations of the military bill. But General Pope acted within the clear letter of the law, which makes it his duty to *protect* "*persons* and *property*."

A palpable need of personal protection was made manifest at the Mobile riot. Further comment on that point is unnecessary.

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[Published June 12, 1867.]

THE MILITARY BILL. — Analysis Summary.

Your correspondent now closes his analysis by the following summary of points covered by the publications of May 30, June 4, and June 7:

First. That the State governments organized since the cessation of active hostilities in the ten rebel States are only *de facto* governments, Congress having solemnly declared "no legal State governments exist in these States."

Second. That *de facto* applies to each of the co-ordinate branches of government, legislative, executive, and judicial. Good during sufferance.

Third. That the State governments organized by President Johnson in said rebel States, were so organized by him without authority from the Constitution or any law of Congress.

Fourth. That said attempt to organize State governments in the rebel States by

President Johnson was a palpable infringement on the plain prerogatives of Congress, wherein the constitution lodges the power to declare war and make final and permanent adjustments upon the termination thereof.

Fifth. That it was the plain duty of President Johnson, on the cessation of hostilities to have convened Congress in extra session, to lay the ground work of final adjustment; and his failing to do so, but undertaking it himself, was reprehensible and unwarranted on his part.

Sixth. That Congress has wisely and justly set the President's work of reconstruction all aside by this "military bill," and properly asserted their own legitimate authority under the constitution, by devising and promulging a plan for final adjustment, and complete restoration in a manner akin to territorial organizations.

Seventh. That the military bill plainly and unmistakably points out the President's duties, beyond which he cannot go, and that it is manifest that Congress jealously guarded against him, that they predetermined that neither the President, nor the Secretary of War, nor the Attorney General who are simple executive appointees, should have power to peremptorily instruct the district commander in matters plainly within the sphere of his duty laid down by the law.

Eighth. That the military officer, after being assigned to duty of district commander under the military bill, has a new orbit in which to act, distinct from the ordinary army routine, not being, however, entirely severed from the latter.

Ninth. That when the supplement to the military bill declared it to be the duty of the officer in command of the district to "cause a registration to be made," Congress did not mean that the President should have again power to intermeddle, by peremptorily directing and instructing who shall be registered, or how registration shall be conducted.

Congress predetermined that matter themselves, leaving much to the good sense and discretion of the officer in command.

This idea does not preclude suggestion, counsel, and advice.

Tenth. In this matter of reconstruction of rebel States, the district commander does not render an "account of his stewardship" to the President or Secretary of War, or even to General Grant.

He accounts alone to Congress by showing final results in the formation of new State governments, to be submitted to the final approval of Congress alone, where the paramount authority rests.

Eleventh. This brings us to the point before asserted, that the district officer must consult the will of Congress alone, as to be understood from laws enacted.

Twelfth. That each district officer, in his orbit created by the military bill, is superior to any *de facto* rebel State government, or any branch thereof over which he is placed, and that he can permit the continuance of any branch of such government or tribunal, or he may remove, suspend, or displace any *de facto* officer of State government within his district, upon such causes as he shall deem satisfactory to himself, as in the case of the removal of the late Governor Wells by General P. H. Sheridan.

Thirteenth. *That it is highly improbable that the Secretary of War will counsel interference by peremptory instructions. He is himself too good a lawyer for that.*

Fourteenth. That the military bill does not mention that it shall be any part of the duty of the officer to revise or modify any decree of any civil court adjudicating purely civil matters relating to collections, etc., but by virtue of the injunction of the law that it shall be his "duty to protect the rights of person and property;" in order to perform such duty he may suspend or annul the execution of a pretended

judicial writ issued in pursuance of a colorable judicial decree founded in fraud, collusion, or political prejudice, and made to subserve the petty spleen of some individual or individuals, and that the execution of such colorable judgment or decree would result in tresspass or other tort to the rights of property of any individual or individuals.

What has been said as to the power of removal of officers, etc., is, of course, confined to State governments and tribunals—not meant to apply to the United States district or circuit courts, they having been established by Congress, and consequently their origin is co-equal with the military bill.

[Published May 30, 1867.]

REGISTRATION.

The Attorney General, near the last of his opinion, says: "The oath itself (of the applicant) is the sole and only test of the qualification of the applicant." Again, "that the board cannot enter upon the inquiry whether he has sworn truly or falsely." He states this as his "conclusion." This implies there is room for a difference of opinion. We clearly see a difference of opinion may and must occur upon the interpretation of the expression "qualified to vote," found in the first section of the supplement to the military bill. Two things must occur to entitle a man to register. First he must be "qualified to vote" under the law there alluded to. Second, he must take the oath in the form therein laid down. Who decides the first question? Here is a decision required akin to the duties of judges of elections, and in this case properly falls upon the board of registrars. Who else can decide the question, "qualified to vote?" The oath required does not negative all the elements of exclusion under the law deciding who is "qualified to vote." It is possible for an applicant to take that oath without danger of perjury, and at the same time have in his person a *negative* element of disqualification to vote under the law alluded to.

If in the decision of the first question, to wit: who are "*qualified to vote*," the board wrongfully and corruptly decide against a person entitled to register, then the board are liable to a civil action for damages in the manner akin to the responsibilities of judges of ordinary elections in any of the States. The position and duties of the board are delicate and responsible. But it is safe to say, no person proposing to perjure himself, but rejected by the board, would risk a ventilation of his attempt by suing the board or members thereof. Far from it.

Another view. Suppose the first section of the supplement had said it shall be the duty of the commanding general to require a registry of all persons "qualified to vote," and then stopped, without requiring the oath of the applicant. Clearly, then, the board must decide who is "qualified to vote."

This springs the question for what purpose was the oath of the applicant required? The answer is, to put on paper a declaration of future attachment and support to the government and influence others to do the same, and also put on paper some facts that aided the board in deciding the first question.

It naturally follows from what has been said, that the registrars look alone to the district commander for instructions to which they must conform.

J. P. BOYD.